

E-FILED on 4/2/10

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

SANTIAGO HERNANDEZ, et al.,
individually and on behalf of all others
similarly situated, and on behalf of the general
public,

Plaintiffs,

v.

UNITED AUTO CREDIT CORPORATION,
and DOES 1-50, inclusive,

Defendants.

No. C-08-03404 RMW

ORDER GRANTING MOTION TO
DECERTIFY CONDITIONAL FLSA CLASS

[Re Docket Nos. 114, 115, 116, 121]

Plaintiffs contend that defendant United Auto Credit Corporation ("UACC") inappropriately classified them as exempt employees under state and federal law and thereby deprived them of overtime pay. On March 20, 2009, this court granted plaintiffs' motion to conditionally certify a collective action under the Fair Labor Standards Act ("FLSA"). UACC now moves to decertify the conditional class. Plaintiffs move for partial summary judgment, seeking, among other things, an adjudication that plaintiffs are not exempt employees. Plaintiffs also seek leave to file a second amended complaint whereby plaintiffs could individually assert their state law claims in this action. Finally, UACC submits that plaintiffs' partial summary judgment motion is premature and should be denied or at least continued. For the reasons stated below, the court grants the motion to decertify

the collective action. The court denies plaintiffs' motion to file a second amended complaint and motion for summary judgment as moot.

I. BACKGROUND

UACC is an automobile financing company. Radrigan Dep. 13:5-12, Jan. 13, 2009. UACC has car-dealer clients who forward applications of customers who need financing to purchase a car. *Id.* at 13:13-19. In 1996, UACC had a total of four branch offices, and as of January 2009, it had approximately 60 branch offices. *Id.* at 16:1-9. At its maximum in mid-2007, UACC had 146 branch offices. *Id.*

UACC's goal in each branch was to have eight employees with the following job titles:

1. Branch Manager
2. Assistant Branch Manager
3. Collections Supervisor (also called a "Senior Account Representative" or "Senior Collector")
4. Administrative Supervisor (also called a "Senior Customer Service Representative")
5. Account Representative 1 (also called a "Collector")
6. Account Representative 2
7. Administrative Coordinator 1 (also called a "CSR")
8. Administrative Coordinator 2

See Def.'s Mot. Decertify 2. In 1996, when the branches were set up, Branch Managers, Assistant Branch Managers, Collections Supervisors, and Administrative Supervisors were all classified as exempt under the FLSA. Radrigan Dep. 72:1-13. These classifications have not changed since 1996. *Id.* at 77:6-10. Job descriptions were drafted at UACC's corporate headquarters and are the same nationwide. Ekizian Dep. 94:17-23, 188:3-12, Jan. 27, 2009. Plaintiffs are a group of past and present UACC employees who contend that they were improperly classified as exempt and deprived of overtime compensation and other benefits. Compl. ¶ 1.

The court conditionally certified the following class: "All persons who are or have been employed by Defendant United Auto Credit Corporation as 'Collections Supervisors,' 'Senior Collectors,' 'Senior Account Representatives,' 'Senior Customer Service Representatives,' and/or

1 'Administrative Supervisors,' at any time [from] three years prior to the filing of this Complaint, to
 2 the final disposition of the case." UACC now moves to decertify the class, contending that the
 3 duties of the Collections and Administrative Supervisors differ too significantly for class
 4 certification to be appropriate under FLSA.

5 II. ANALYSIS

6 A. Legal Standard for Conditional Certification and Decertification of Collective 7 Actions under FLSA

8 An action for violation of the FLSA may be maintained "by any one or more employees for
 9 and in behalf of himself or themselves and other employees similarly situated." 29 U.S.C. § 216(b).
 10 Section 216(b) of the FLSA also requires that an employee wishing to be a plaintiff must opt-in and
 11 file a consent with the court. *Id.* The statute does not define the term "similarly situated," and the
 12 Ninth Circuit has yet to interpret this phrase. *See Leuthold v. Destination America*, 224 F.R.D. 462,
 13 467 (N.D.Cal. 2004). But most courts interpreting Section 216(b) have used a two-step approach.
 14 *See Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1218-19 (11th Cir. 2001) ("The two-tiered
 15 approach to certification of § 216(b) opt-in classes . . . appears to be an effective tool for district
 16 courts to use in managing these often complex cases, and we suggest that district courts in this
 17 circuit adopt it in future cases."); *Wynn v. Nat'l Broad. Co., Inc.*, 234 F. Supp. 2d 1067, 1082
 18 (C.D.Cal. 2002) (citing *Thiessen v. General Electric Capital Corp.*, 267 F.3d 1095, 1102-03 (10th
 19 Cir. 2001) and *Bayles v. American Med. Response of Colo., Inc.*, 950 F. Supp. 1053, 1067 (D.Colo.
 20 1996)); NEWBERG ON CLASS ACTIONS § 24:3 (4th ed. 2008).

21 Under the two-step approach, the court first considers whether to certify a collective action
 22 and permit notice to be distributed to the putative class members. *See Thiessen*, 267 F.3d at 1102;
 23 *Russell v. Wells Fargo & Co.*, 2008 WL 4104212, at *2-3 (N.D.Cal. Sept. 3, 2008). At this first
 24 stage, the standard for certification is fairly easy to satisfy. Courts have required only "substantial
 25 allegations, supported by declarations or discovery, that the putative class members were together
 26 the victims of a single decision, policy, or plan." *Russell*, 2008 WL 4104212, at *2.

27 At the second stage, after discovery has been taken, the court may decertify the class if it
 28 concludes that the class members are not similarly situated. *Id.* at *3. The court can consider a
 number of factors in deciding whether an action should ultimately proceed collectively, including:

(1) the disparate factual and employment settings of the individual plaintiffs; (2) the various defenses available to the defendant and whether they appear to be individual to each plaintiff; (3) fairness and procedural considerations; and (4) whether plaintiffs made the required filings before filing suit. *Thiessen*, 267 F.3d at 1103. However, a requirement that the class members be identical would be inconsistent with the intent of FLSA's provision that a case can proceed as a collective action. *Pendlebury v. Starbucks Coffee Co.*, 518 F. Supp. 2d 1345, 1361 (S.D.Fla. 2007).

B. Decertification of Plaintiffs' Collective Action

1. Exempt Employees

The FLSA specifies that its minimum wage and overtime provisions do not apply to employees "employed in a bona fide executive capacity." 29 U.S.C. § 213(a)(1). Employees fall within this executive exception when they are:

- (1) Compensated on a salary basis at a rate of not less than \$455 per week . . . ;
- (2) Whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
- (3) Who customarily and regularly directs the work of two or more other employees; and
- (4) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees are given particular weight.

29 C.F.R. § 541.100(a). With respect to the requirement that the employee's primary duty be management, the regulations provide a lengthy, non-exhaustive list of managerial activities.¹ For

¹ "Generally, 'management' includes, but is not limited to, activities such as interviewing, selecting, and training of employees; setting and adjusting their rates of pay and hours of work; directing the work of employees; maintaining production or sales records for use in supervision or control; appraising employees' productivity and efficiency for the purpose of recommending promotions or other changes in status; handling employee complaints and grievances; disciplining employees; planning the work; determining the techniques to be used; apportioning the work among the employees; determining the type of materials, supplies, machinery, equipment or tools to be used or merchandise to be bought, stocked and sold; controlling the flow and distribution of materials or merchandise and supplies; providing for the safety and security of the employees or the property; planning and controlling the budget; and monitoring or implementing legal compliance measures." 29 C.F.R. § 102.

those activities to constitute an employee's "primary duty," they must be "the principal, main, major or most important duty that the employee performs." 29 C.F.R. § 700.

Determination of an employee's primary duty must be based on all the facts in a particular case, with the major emphasis on the character of the employee's job as a whole. Factors to consider when determining the primary duty of an employee include, but are not limited to, the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.

Id. As is apparent from the above factors, the assessment of whether an employee falls into the executive exception is an individual and fact-intensive inquiry and necessitates a careful factual analysis of the full range of the employee's job duties and responsibilities. *See Mike v. Safeco Ins. Co. of America*, 274 F. Supp. 2d 216, 220 (D.Conn. 2003).

2. The "Ratio Requirement"

Before considering the factors relevant to the substantive merits of the motion to decertify, the court briefly deals with an argument made by plaintiffs at oral argument regarding the FLSA's purported requirement that there be a "ratio between executives and workers." Rough Tr. 4. Under the FLSA, plaintiffs stated, "at a minimum you need to have two workers for every executive. They're on the wrong side of the ratio, and they're not even close. They have a five – they have five executives for three or four workers, and they need to have two workers for every one executive."

Id.

Plaintiffs' argument overstates the requirement of the pertinent FLSA regulation. Plaintiffs are correct that in order to qualify for the executive exemption, an employee must "customarily and regularly direct[] the work of two or more other employees." 29 C.F.R. § 541.100(a)(3). The language of the regulation, however, does not require a strict mathematical ratio between an "employee employed in a bona fide executive capacity" and "other employees." All the regulation requires is that an *employee* customarily or regularly direct the work of *two or more other employees*. The other employees whose work the executive directs may or may not themselves be executives. Thus, the FLSA does not create a "ratio requirement." Whether the present conditional

1 class should be decertified, then, depends on the individualized assessment of whether the class
2 members are "similarly situated." The court now turns to that inquiry.

3 **3. The Conditional Class Members Are Not "Similarly Situated"**

4 **a. Disparate Factual and Employment Settings of Individual Plaintiffs**

5 In its motion to decertify, UACC offers evidence of the variety of job responsibilities that
6 Collections Supervisors and Administrative Supervisors have had at UACC branches. Def.'s Mot.
7 Decertify 3-12. Approximately 120 Collections Supervisors and Administrative Supervisors from
8 77 different branches have opted in to the present action.² UACC describes the practices of thirteen
9 Collections Supervisors and six Administrative Supervisors in its motion to decertify, and among
10 those that UACC presents, there is a fairly wide variety of managerial responsibilities. *Id.*
11 Collections Supervisors Santiago Hernandez, Jesus Romero, and Amber Brown, for example, do not
12 appear to have had many, if any, supervisory duties. *Id.* at 3, 6. On the other hand, Carlos Zavala,
13 Sharon McNair, and Dorian Lanier do supervise collectors, review and advise the work of
14 subordinates, and have some say in hiring and promotion decisions. *Id.* at 6-9.

15 Plaintiffs respond that common evidence can establish that management was not the primary
16 duty of class members. Plaintiffs' opposition, however, focuses not on the job responsibilities of
17 class members, but on the duties of the Branch Manager and Assistant Branch Manager. The
18 Branch Manager and Assistant Branch Manager, plaintiffs argue, "manage" all of the employees in
19 the office while the employees at issue – the Collections and Administrative Supervisors – only
20 "supervise" subordinate employees. Opp'n Mot. Decertify 2-14. Plaintiffs offer significant
21 evidence, in the form of job description documents and testimonial descriptions, that the Branch
22 Managers and Assistant Branch Managers have substantial managerial responsibilities. But the
23 exempt status of the Branch and Assistant Managers is not the dispositive issue in this suit; the
24 exempt status of the Collections and Administrative Supervisors is. Plaintiffs' argument appears to
25 rely on the inference that if Branch Managers and Assistant Branch Managers "manage" employees,
26 then Collections and Administrative Supervisors must not. However, plaintiffs provide no basis for
27

28 ² UACC says that there have been several hundred Collections and Administrative Supervisors over
the past three years. Def.'s Mot. Decertify 1.

1 drawing such an inference and provide no support for their contention that supervisors "supervise"
2 and do not "manage." In fact, the balance of UACC's evidence in support of decertification is
3 directed at establishing that in many cases the supervisors did in fact engage in activities defined
4 under FLSA as "managerial." *See* Def.'s Mot. Decertify 3-12. Although job descriptions come from
5 corporate headquarters and are used nationwide, the actual work performed by employees varies
6 significantly from branch to branch. This variation appears to result from the fact that UACC has
7 experienced significant employee turnover and numerous mergers and closures of branches. *See*
8 Radrigan Dep. 15:1-16:9.

9 In response to the evidence of the lack of uniformity of the duties of Collections and
10 Administrative Supervisors, plaintiffs point out that, in the same branches where supervisors are
11 alleged to have significant managerial responsibilities, the Branch and Assistant Managers manage
12 employees. Opp'n Mot. Decertify 19-22. In short, the only evidence that plaintiffs offer to rebut the
13 specific testimony that supervisors had managerial responsibility is that their managers also had
14 supervisory responsibility. *Id.* Plaintiffs state that "[a]pparently, there is quite a bit of supervising
15 happening in that one department." *Id.* at 19. Ultimately, plaintiffs provide the court with little
16 more than skepticism that four out of eight employees would perform primarily managerial duties.

17 Plaintiffs point to the fact that defendants' job descriptions are drafted at its corporate
18 headquarters in a collaborative effort among its officers, that the job descriptions are the same for
19 each branch, Ekizian Dep. 94:17-23, 188:3-12, and that UACC treats all Collections Supervisors and
20 Administrative Supervisors as exempt. However, the recent decision of *In re Wells Fargo Homes*
21 *Mortg. Overtime Litig.*, 571 F. 3d 953 (9th Cir. 2009), which involved certification under Federal
22 Rule of Civil Procedure 23(b)(3), cautions against placing too much weight on an internal policy of
23 classifying all members of a particular class of employees as exempt. The Ninth Circuit reversed the
24 district court's class certification because the court placed too much weight on Wells Fargo's uniform
25 policy rather than examining what duties the class members actually performed. *Id.* at 959.

26 **b. Defenses Available Against Individual Plaintiffs**

27 Defendant UACC argues that its statute of limitations defense will apply differently to the
28 various plaintiffs. Although there might be disputes as to when a particular employee worked for

1 UACC or whether any FSLA violation was willful as to a particular plaintiff (thus resulting in a
2 three year limitation as opposed to two), such disputes would not be a major impediment to a
3 collective action. The periods of employment in most cases would likely be subject to agreement or
4 easily verifiable proof. The willfulness question would probably, in most cases, be capable of
5 resolution on a class-wide basis. Therefore, the limited risk of having to deal with individualized
6 defenses does not weigh against a collective action in this case.

7 **c. Fairness and Procedural Considerations**

8 The court cannot overlook the fact that a primary goal of Section 216 of the FLSA is to
9 implement the broad remedial purposes of the FLSA. If the parties agreed as to the duties performed
10 by plaintiffs, or reliable evidence showed that employees performed substantially similar work, a
11 collective action under Section 216 would clearly be appropriate. However, here, where there
12 appears to be substantially different employment experiences among the various Collections and
13 Administrative Supervisors, the procedural advantages of a collective action cannot be realized. It
14 appears that many supervisors did have significant managerial duties, such that case by case
15 determinations as to the propriety of their exempt status will be necessary. It is difficult to see how a
16 class action could proceed fairly and efficiently, given that each plaintiff's work situation will have
17 to be examined to see what duties he or she performed. The potential for a class-wide ruling on
18 liability seems slim. And even if liability could be determined on a class-wide basis, the court
19 would still face the prospect of having to determine individualized damages.

20 **4. Conclusion**

21 The court concludes that this action should not proceed collectively and therefore grants
22 UACC's motion to decertify the conditional class.

23 **C. Other Motions**


24 Plaintiffs also move for leave to file a second amended complaint and for partial summary
25 judgment. UACC moves to deny or continue plaintiffs' motion for summary judgment pursuant to
26 Federal Rule of Civil Procedure 56(f). Because plaintiffs' summary judgment motion seeks
27 summary judgment that UACC cannot prove an affirmative defense on a class-wide basis, the court's
28 conclusion that the class should be decertified renders the summary judgment motion moot.

1 Furthermore, plaintiffs apparently do not wish to amend their complaint if the collective
2 action is decertified. Plaintiffs' counsel has stated in an email that: "If the Court decertifies,
3 California Plaintiffs will assert their state claims in the district in which they file." Decl. Chad
4 Anderton Supp. Opp'n Mot. Amend Ex. 2.

5 III. ORDER

6 For the foregoing reasons, the court grants UACC's motion to decertify the conditional class.
7 This order does not preclude possible joinder of parties, such as Administrative Supervisors at a
8 particular branch, in individual actions. The court denies plaintiffs' motion for partial summary
9 judgment and motion to file a second amended complaint as moot. UACC's 56(f) motion is also
10 denied as moot.

11
12 DATED: 3/31/10



RONALD M. WHYTE
United States District Judge

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11 **Dated:** 4/2/10

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Chambers of Judge Whyte